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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/699,187	11/01/2003	John Anthony Guido	UT09042003	3480
31105	7590	08/03/2007	EXAMINER	
LAW OFFICE OF PHILIP A STEINER			MAHAFKEY, KELLY J	
846 HIGUERA STREET			ART UNIT	PAPER NUMBER
SUITE 4			1761	
SAN LUIS OBISPO, CA 93401			MAIL DATE	DELIVERY MODE
			08/03/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/699,187	GUIDO, JOHN ANTHONY	
	<b>Examiner</b>	<b>Art Unit</b>	
	Kelly Mahafkey	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 5/10/07 and 5/32/07.

2a)  This action is **FINAL**.                    2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

4)  Claim(s) 1-3,5-10,12-15 and 17-20 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-3,5-10,12-15 and 17-20 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All b)  Some \* c)  None of:  
1.  Certified copies of the priority documents have been received.  
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

1)  Notice of References Cited (PTO-892) 4)  Interview Summary (PTO-413)  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948) Paper No(s)/Mail Date. \_\_\_\_.  
3)  Information Disclosure Statement(s) (PTO/SB/08) 5)  Notice of Informal Patent Application  
Paper No(s)/Mail Date 6/4/07. 6)  Other: \_\_\_\_.

**DETAILED ACTION**

Amendments made May 10, 2007 have been entered.  
Claims 1-3, 5-10, 12-15, and 17-20 are pending.

***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on May 31, 2007 has been entered.

***Claim Rejections - 35 USC § 112***

The 112 1<sup>st</sup> paragraph rejection of claims 1-13, 15, 16, and 20 have been withdrawn in light of applicant's amendments made May 10, 2007.

***Claim Rejections - 35 USC § 112 2<sup>nd</sup> Paragraph***

The 112 2<sup>nd</sup> paragraph rejection of claims 2, 5, 6, 8-13, 15, 16, and 19 have been withdrawn in light of applicant's amendments made May 10, 2007.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 103(a) rejection of claims 1-3 and 5-20 over Verharghe (US 2002/0170398 A1) in view of the combination of Sanders et al (US 6213302 B1) and Bettencourt et al. (US 3986561) has been withdrawn in light of applicant's amendments and arguments filed May 10, 2007.

Claims 1-3, 5, 6, and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Verhaeghe (US 2002/0170398 A1) in view of the combination of

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Cruess (Commercial Fruit and Vegetable Products, 3<sup>rd</sup> Edition, 1948) and Studer (US 4232506).

Verhaeghe teaches a shelf stable processing stream for the packaging of fresh cut tomatoes comprising:

- Obtaining fresh tomatoes,
- cutting the tomatoes in a fresh cut process,
- removing the tomato tops and ends (i.e. undesirable sections),
- depositing the cut tomato middle (i.e. the tomato without the undesirable sections) into one or more containers, and
- further processing the undesirable sections.

Refer specifically to Abstract and Paragraphs 0016, 0017, 00190030, 0035, 0040, and 0043.

Verhaeghe, does not explicitly teach a method for collecting the tomatoes, including harvesting the tomatoes and visually selecting the tomatoes for processing as recited in claims 1, 5, 8, and 10, the tomatoes within a shelf stable process within a processing facility (i.e. the same processing facility) as recited in claims 1 and 8, and the excess tomato juice from the fresh cut tomato process into the shelf stable processing stream as recited in claim 6.

Studer discloses an improved tomato harvesting system. Refer specifically to Abstract and Background of the Invention. Studer teaches that the tomatoes mechanically harvested can be fresh market tomatoes or canning tomatoes (Column 3 lines 5-16). The method as taught by Studer for harvesting tomatoes is more efficient than other known harvesting methods (Column 2 lines 54-60).

Cruess teaches of a process for processing tomatoes. Cruess teaches that in the process of making tomato puree, tomatoes where visually sorted based on characteristics such as color, ripeness, damage, defects, ect (Page 431-432). Cruess teaches that the damaged tomatoes and other tomato by-products of the primary processing stream are reintroduced into the same or a different processing stream for the purpose of forming the same and other tomato products including juices and purees. One of ordinary skill in the art at the time the invention was made would expect the use

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of by-products to form a salable product would result in savings. Cruess teaches that the sound portion of a damaged tomato is salvaged for use in a tomato puree. Refer specifically to pages 436-437. Cruess teaches that juice was a vital ingredient in tomato purees, since it is rich in dissolved tomato solids (Page 444). Cruess teaches that tomato puree is canned and thus consists of a shelf stable process (Page 449).

Regarding harvesting the tomatoes, Verhaeghe teaches of utilizing tomatoes, however is silent to the method for collecting the tomatoes, thus one of ordinary skill in the art would have been motivated to look to the tomato harvesting art, such as Studer, to determine a method for collecting tomatoes as disclosed by Verhaeghe. One would have been further motivated to mechanically harvest the tomatoes by the method as taught by Studer, in order collect the tomatoes in the most efficient way with minimal damage.

Regarding visually selecting the tomatoes for processing, as evidenced by Cruess, it was known in the art at the time the invention was made visually sort tomatoes for tomato processing in order to remove damaged tomatoes. It would have been obvious to one of ordinary skill in the art at the time the invention was made to visually sort out damaged tomatoes in the tomato processing method as taught by Verhaeghe. One would have been motivated to do so in order to prevent rotten or damaged tomatoes from being included in the fresh sliced tomato product as taught by Verhaeghe.

Regarding the tomatoes within a shelf stable process within a processing facility (i.e. the same processing facility), it would also have been obvious to one skilled in the art to divide the produce into different processing streams to obtain different type of produce. For example, it would have been obvious to place some produce into stable shelf process stream if one wants to make packaged product. It would have been obvious to include different processing in the same facility to make the process more efficient in term of space and time. Verhaeghe teaches that the undesirable sections can be utilized for further processing. Additionally, as stated above, one of ordinary skill in the art at the time the invention was made would have been motivated to remove damaged tomatoes from the fresh cut processing stream as taught by Verhaeghe.

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Cruess teaches that tomatoes or tomato pieces removed from a primary processing stream can be utilized in another or the same tomato processing application. Cruess teaches that portions of damaged tomatoes can be salvaged to make tomato puree. As stated above, one of ordinary skill in the art would expect the use of by-products to produce sellable products, such as the ones as taught by Cruess, would result in an increased profit margin. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include the salvageable portions of the damaged tomatoes, in another tomato processing application, in order to turn a by-product into a final product, which could be sold for profits. Since Verhaeghe is silent to the additional products the tomato by-products can be used for and since Cruess teaches that the additional tomato by-products can be used for purees and juices, one would have been further motivated to include the salvageable portions of the damaged tomatoes in a shelf stable product, such as a tomato puree as taught by Cruess. Based on the knowledge available to one of ordinary skill in the art, one would have been further motivated to include both the primary tomato processing and the secondary tomato processing in a (i.e. the same) processing facility in order to avoid shipping costs. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the fresh-cut tomato processing stream as taught by Verhaeghe with a shelf-stable by-product processing stream as taught by Cruess. Use of this known technique would have been within common sense and ordinary ingenuity of one of ordinary skill in the art and would not impart a patentable distinction to the claims, since the technique was a known step in processing tomatoes and does nothing more than provide expected results to the method of processing tomatoes as taught by Verhaeghe.

Regarding the excess tomato juice from the fresh cut tomato process into the shelf stable processing stream as recited in claim 6, as stated above, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include the salvageable portions of the damaged tomatoes, in a tomato puree, in order to turn a by-product into a final product which could be sold for profits. Cruess teaches that tomato juices were a valuable aspect in tomato purees (Page 444). Furthermore,

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since tomatoes contain moisture, one of ordinary skill in the art at the time the invention was made would expect tomato juice to be an undesirable by-product when producing sliced tomatoes. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to collect and use the tomato juice produced when cutting the tomatoes in the tomato puree by-product. One would have been motivated to do so in order to enhance the tomato puree.

Claims 7, 12-15, and 17-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Verhaeghe (US 2002/0170398 A1) in view of the combination of Cruess (Commercial Fruit and Vegetable Products, 3<sup>rd</sup> Edition, 1948) and Studer (US 4232506), further in view of Sanders (US 3986561).

Verhaeghe in view of Cruess and Studer teach of a method for processing tomatoes, including combining a shelf stable processing stream and a fresh cut processing stream as discussed above. The references, however, are silent to the type of container used to package the tomatoes (i.e. including a modified atmosphere package with a transparent lid) as recited in claims 7, 12, 13, 14, and 17.

Sanders et al. (Sanders) discloses of a tray for packaging sliced tomatoes. They teach that the tomato container is a modified atmospheric package with a transparent lid. Sanders teaches that the container provides an improved method for packaging and preserving sliced tomatoes in a fresh condition. Refer specifically to Column 1 line 58 through Column 2 line 5, Column 2 lines 24-28 and 43-63, and Column 3 lines 50-67.

Regarding the type of container used to package the tomatoes, including a modified atmosphere package with a transparent lid, Verhaeghe teaches of packaging a sliced tomato, however does not teach of specific package for doing so, therefore one of ordinary skill in the art would have been motivated to look to the tomato packaging art, such as Sanders, for a known package for tomatoes. One would have been further motivated to use the clear, modified atmosphere package as taught by Sanders, because it is an improved package for preserving sliced tomatoes in a fresh condition.

***Response to Arguments***

Applicant's arguments have been considered but are moot in view of the new ground(s) of rejection. Applicant's arguments have been addressed within the new rejection.

Applicant argues that modified atmosphere packaging is incompatible with aseptic packaging (Remarks page 14/16). This argument, however, is not convincing, as applicant cites no evidence or reasoning in support of the argument, and as applicant claims modified atmosphere packaging as part of an aseptic process (Claims 7, 12, and 14).

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure

US 3878996 discloses of a machine for processing tomatoes not perfectly ripe or damaged during processing operations into tomato concentrate.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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